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the Government of the State of New York a

Republic or a Despotism?

Ellen Burdick

the Members of the Constitutional Convention :

This is a republican government—a democracy. So says the Declaration of Independence and the Constitution of the United States, and so say all the State Constitutions. A republican government is a government of the people. All power is in the people. The will of the people expressed in the law is the supreme power. Each member of the community is the equal of each and every other member of the community. The right of each member of the community is the right of each and every other member of the community. *The liability of each member of the community is the liability of each and every other member of the community, not a jot or tittle more or less.*

Permit the incongruity of permitting power, &c., to exist, and you have a despotism. The declarations of liberty, equality, &c., are mere shadows.

The consequence of the conflict of A for man-slaughter in the first degree, State, is that the

I cite the following from the 1st, Kent:

“WE, THE PEOPLE OF THE UNITED STATES, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.”

“This Constitution and the laws made in pursuance thereof, shall be the supreme law of the land.”

“The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.”

“The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered and fre-

law demands his confinement for seven years, and gives to the judge before whom he is tried the right to further imprison him for the balance of his life. Here the judge has an interest which he can quit-claim. In case the conviction be in the fourth degree, in addition to an interest to quit-claim, the judge can impose or not at his discretion a royalty to the state of \$1000; and for the exercise of his discretion he is accountable to no one; *as complete master of the position as an owner in fee of a piece of real estate.* And this principle of discretionary terms of imprisonment and fines, or rather royalties, runs through the entire criminal code, each magistrate, in greater or less degree, having this power; and at the head of all, the governor, who can unconditionally release whom he will, and consequently detain whom he will; and all the prisons of the State are at his command; *he stands with power of freedom or slavery, as absolute as a slave proprietor over his barracoons on the African coast.*

If your wife, sister, or mother be raped, the State gets ten years, the judge the balance of the convict's life to quit-claim; and if sentenced, the governor may immediately pardon.

If your sister or daughter be seduced, the State gets one day, the judge four years and three hundred and

quently declared the people of this country to be natural, inherent, inalienable."

"Our ancestors insisted that they brought with them into this country the privileges of English freemen, and they defined and declared those privileges to be—the rights of trial by jury and the necessity of due proof preceding conviction, were claimed as undeniable rights; and it was further expressly ordained *that no person should suffer without EXPRESS law, either in life, limb, liberty, good name or estate;* nor without being first brought to answer by due course and process of law."

"It was declared by them that the imprisonment of subjects without due commitment, for legal cause, &c., were illegal and arbitrary acts."

"It was regarded and claimed in all the colonies as a branch of their sacred and indefeasible rights, that the people were entitled to be secure in their persons, property and privileges, and that they could not lawfully be disturbed or affected in the enjoyment of either,

sixty-four days to quit-claim, and if imprisoned, the governor may immediately pardon.

If your sister or daughter be led astray for prostitution, the State insists on one day, and the judge can quit-claim for one year and three hundred and sixty-four days; and if imprisoned the governor can pardon.

If your sister or daughter under sixteen years be taken for prostitution, the State insists on one day, the judge gets an estate of two years and three hundred and sixty-four days to quit-claim, and the right to quit-claim the estate of the State to \$1000 royalty.

I have endeavored to correctly quote the statutes, but an error will not affect my argument.

These powers are all royal prerogatives, and were instituted in governments where the head was sole owner of the subject, his life, his limb, his honor, his estate, ^{Note 1.} and these prerogatives were for the increasing of the royal revenue. Crime was a source of profit to the king; and all his officers, his judges, &c., were but his tools to foster and increase his revenue. As we see, Blackstone laments that the fines, &c., were swallowed by the direct receivers, and the king profited nothing. ^{Note 2.} We know, the fines, forfeited recognizances, &c., are swallowed by the direct recipients, and the State profits nothing. These powers can have no legitimate existence

without due process of law and the judgment of their peers."

"In the declaration of the first Continental Congress of 1774, it was declared that the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and their several charters or compacts, were entitled to life, liberty and protection, and that they had never ceded to any sovereign power whatever a right to dispose of either without their consent; and that their ancestors who first settled the colonies, were, at the time of their emigration from the mother country, entitled to all the rights, liberties and immunities of free and natural born subjects; and by such emigration they by no means forfeited, surrendered or lost any of those rights."

"The government in all its parts is the creature of the people, and every department of it is filled by their agents chosen and appointed according to their will, &c."

"When the spirit of liberty has fled, and truth and justice are disregarded, private rights can easily be sacrificed under the forms of law. It requires more than

in our government. They are in direct contradiction to our form of government, and can properly exist only in a despotism. The king is the head of the government and all power comes from him. His will is the supreme law; from his decision there is no appeal; he can do no wrong; all suits, processes, &c. run in his name.

In a republican government all power is in the people. Their expressed will, the law, is the supreme power, and all officers of government, from the President down, are but the servants of the people to execute their will, the law.^{Note 3.} All suits, processes, &c., run in the name of the people, and certainly if these prerogatives are tolerated, then the servants of the people are the masters of the people, and the law is not the supreme power, but is subject to the will of the servant. In a republic, each is the equal of the other, and all are subject to the law. By the admission of these prerogatives the people are the serfs of the rulers, and their persons and property are at the discretion of the rulers. What liberty, what equality is there if the liberty and property of one is at the discretion of another?

In former times, and now in barbarous nations, the captives are the property of the captors; the women for use, the men, women and children for ransom.

These things which we call laws want the essence—the life of law, POWER.

ordinary hardness and audacity of character to trample down principles which our ancestors cultivated with reverence; which we imbibed in our early education; which recommend themselves to the judgment of the world by their truth and simplicity, and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction. Bills of right are parts of the muniments of freemen, showing their title to protection, and they become of increased value when placed under the protection of an independent judiciary instituted as the appropriate guardian of private rights."

Note 1. I quote from Blackstone—

"It is impossible to understand the constitution or laws of this country without an acquaintance with the feudal law, the law of nations in Europe. By this law, 'the king is the universal lord and original proprietor of all lands in his kingdom, and no man doth or can possess any part of it but what has been mediately or immediately devised as a gift from him to be held for feudal services.' All subjects were vassals, and each took to the king openly and humbly, kneeling, being ungirt, uncovered, and holding up his hands both together between those of his lord who sat before him, the oath and profession THAT HE DID BECOME HIS MAN, FROM THAT DAY FORTH, OF LIFE AND LIMB AND EARTHLY HONOR."

They are mere shams to deceive the people.

Mere traps to catch game for magistrates.

No captive stands alone ; with him bound by the chains of affection and kindred is a family ; AND WHILE HE IS CAPTIVE THE EFFORT AT RANSOM NEVER CEASES. Does the Chief trade direct or has he his regular brokers ? Does he release to his supporters in consideration of services rendered or to be rendered, or is it an act of courtesy to a friend ? Does some observer of the prostration of the family work the release for gratification or gain, or is it some hitherto balked one, who now can command success ? Is it the person of a member of the family that is coveted, or is it gain ? *As the person and boxes of a traveller are at the discretion of the Custom-House official for search,* so now, the family are, to chief and go-betweens. Affections, interests, hopes, etc., must all give way, secrets must be laid bare, questions answered. Are the means of ransom within the grasp of the family or must new crime be committed ? The occupation, routine, and harmony of the family is broken up—Home, that one sacred, hallowed spot—the hope and refuge of all, is invaded, profaned, laid waste,—the self-respect, the spirit, the manhood of the family is trodden out, and its members made spiritless, aimless, hopeless and reckless. *The support of the State is the family, and it is of vital interest to the State that the family should be protected, and that home should be held sacred.*

THE YOUNG, THE POOR, THE UNINFLUENTIAL, AND THAT WEAKEST OF ALL CLASSES, THE IGNORANT, MUST BE PROTECTED. THE FAMILY MUST BE PROTECTED. THE YOUNG, THE POOR, THE UNINFLUENTIAL, THE IGNORANT MUST NOT BE TEMPTED. THE FAMILY MUST NOT BE TEMPTED. "LEAD US NOT INTO TEMPTATION." was the precept of the greatest of lawgivers. *The tendency of the present laws is to seduce, to corrupt, to make criminals.* The power is the Magistrate and not the law—the people recognize that fact and address themselves to the man, and each magistrate surveying his position uses all the means within his grasp to forward his views of his interest—this and the utter failure of the law to secure to the people personal liberty and personal security is the cause of the

"By the word prerogative we usually understand that special preëminence which the king has over and above all other persons, and out of the ordinary course of the common law in right of his regal dignity. *It can only be applied to those rights and capacities which the king enjoys alone in contradistinction to others, and not to those which he enjoys in common with any of his subjects : for*

present wide-spread awful demoralization, the laws being of no force, the magistrates being supreme, and the people well understanding the state of affairs, and having no confidence in the powers that be **UNDERTAKE AS BEST THEY CAN TO PROTECT THEMSELVES. HENCE THE MURDERS, OUTRAGES, &c., THAT ARE OF DAILY OCCURRENCE.** Let the law be supreme and all these incentives to corruption vanish. I repeat, the family, the young, the poor, the uninfluential, the ignorant must not be tempted. It is the interest of the very men who now exercise these powers that the views of this pamphlet should prevail, for to what end are their labors if, when they are removed, the dear ones for whom they have labored are to be at the discretion of despots? Let each one take the case home to himself and look at it with the eyes of a father, husband, brother or son.

The liberty and property of no one should be at the discretion of another. No one that ever lived is fit to possess such power. The possession of such power inevitably induces its abuse in a greater or less degree.

Kings, governors, judges, magistrates, all men, all politicians, all have appetites and passions to gratify for women, political influence, power, position; all have prejudices, weaknesses, vanities.

if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer, and, therefore, Feuch lays it down as a maxim, that THE PREROGATIVE IS THAT LAW IN CASE OF THE KING WHICH IS LAW IN NO CASE OF THE SUBJECT."

And again—

"It is necessary to distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation. For, though a philosophical mind will consider the royal person merely as one man appointed by mutual consent to preside over many others, and will pay him that reverence and duty which the principles of society demand, YET THE MASS OF MANKIND WILL BE APT TO GROW INSOLENT AND REFRACTORY IF TAUGHT TO CONSIDER THEIR PRINCE AS A MAN OF NO GREATER PERFECTION THAN THEMSELVES. THE LAW, THEREFORE, ASCRIBES TO THE KING IN HIS HIGH POLITICAL CHARACTER NOT ONLY LARGE POWERS AND EMOLUMENTS, WHICH FORM HIS PREROGATIVE AND REVENUE, BUT LIKEWISE CERTAIN ATTRIBUTES OF A GREAT AND TRANSCENDENT NATURE, BY WHICH THE PEOPLE ARE LED TO CONSIDER HIM IN THE LIGHT OF A SUPERIOR BEING, AND TO PAY HIM THAT AWFUL RESPECT WHICH MAY ENABLE HIM WITH GREATER EASE TO CARRY ON THE BUSINESS OF GOVERNMENT—this is what I understand by the royal dignity."

And again—

"The king is equally sovereign and independent as any emperor in his empire. *No suit or action can be brought against him, for no court can have jurisdiction over him; for jurisdiction implies superiority of power, &c.* The person of the king is sacred, even though the measures pursued by him be completely tyrannical and arbitrary. THE KING CAN DO NO WRONG, AND IN HIS POLITICAL CAPACITY HE IS ABSOLUTE PERFECTION."

And again—

"IN THE EXERCISE OF HIS PREROGATIVE, THE KING IS AND OUGHT TO BE ABSOLUTE—THAT IS, SO FAR THAT NO LEGAL AUTHORITY CAN DELAY OR RESIST HIM—he may reject what bills, &c., &c., *may pardon what offences he pleases.*"

And again under head of KING'S REVENUE.

"The profits arising from the king's ordinary courts of justice make a ninth

History is a record of the prostitution of power by rulers, emperors, kings, queens, &c., to the gratification of individual appetites.

The law is, that a person committing a certain act, shall be confined in prison for a certain period. This is an arbitrary, and to a certain extent, a tyrannical act, and it can only be justified by its necessity for the public security, *and by its exact and even imposition on all.* To imprison one for one period and another for another, for the same crime; or to imprison a poor man and let a rich man escape imprisonment by paying a fine; to imprison the friendless one, and let the one having influence escape; is intolerable wrong and oppression, and is a despotic act, and is entirely at variance with the spirit of a Republican or Democratic government, the principle of which is the supremacy of the law *and the exact equality of all men in the eye of the law.* The reason of the law is the soul of the law. The reason of the government is the soul of the government, and must be final in deciding all questions under it.

This power of judges and governors to vary at will punishment for crime is to punish the convict not for the crime, but for being poor, uninfluential, or stupid. The writ of habeas corpus is to inquire as to wrongful detention, etc.; but a convict under sentence is excepted

branch of his revenue, and these consist NOT ONLY IN FINES IMPOSED ON OFFENDERS, FORFEITURES OF RECOGNIZANCES, AND AMERCEMENTS LEVIED ON DEFAULTERS, but also in certain fees due to the crown in a variety of legal matters."

Note 2. "These, in process of time, have been almost all granted out to private persons, or else appropriated to certain particular uses, so that though our law proceedings are still loaded with their payment, very little of them is now returned into the king's exchequer."

"In democracies this point of pardon can never subsist, for there nothing higher is acknowledged than the magistrate who administers the law," &c.—BLACKSTONE.

MR. BLACKSTONE IS NOT CORRECT IN THIS, "that nothing higher is acknowledged than the magistrate," &c. THE LAW IS HIGHER; IT IS THE HIGHEST, THE SUPREME POWER, AND THE MAGISTRATE IS BUT THE PRONOUNCER OF THE LAW.

The national judges are no more than the mouth that pronounces the words of the law—mere passive beings, incapable of moderating either its force or its rigor.—MONTESQUIEU.

And again—

"In republics, the very nature of the constitution requires the judges to keep to the letter of the law."—MONTESQUIEU.

"Judgments ought to be fixed to such a degree as to be always conformable to the exact letter of the law—were they to be the private opinion of the judge, people would live in society without knowing exactly the obligations it lays them under."—MONTESQUIEU.

Note 3. "The government in all its parts is the creature of the people, and every department of it is filled by their agents, duly chosen or appointed according to their will, and made responsible for mal-administration."—KENT, Vol. —, p. 594.

It was also ordained that no person should suffer WITHOUT EXPRESS LAW IN LIFE, LIMB OR PROPERTY.—ID.

In a despotic government the power is communicated entire to the person entrusted with it. The Vizier himself is the despotic prince, and each particular officer, is the Vizier.

IN A DESPOTIC GOVERNMENT, THE VIZIER IS ANSWERABLE WITH HIS HEAD FOR THE EXERCISE OF HIS POWER.—MONTESQUIEU. HERE WE HAVE THE EXERCISE OF POWER WITH NO RESPONSIBILITY.

from its benefit. *Withdraw that exception.* If the convict is unjustly convicted and imprisoned, he is wrongfully detained, and he should have the benefit of the writ. Let the hearing, as in motions for new trials, be before the General Term; let the petition set forth the conviction and record, and the facts, newly discovered evidence, etc., on which the convict relies; in case of death or absence of witness on former trial, let the record supply the deficiency on any subsequent trial—the matter can easily be so guarded as to secure justice to the convict and the State.

Justice will thus be done, and the supremacy of the law maintained. I have submitted some suggestions as to amendments of the Constitution to carry out the ideas of this pamphlet. *If these amendments be made we will then for the first time have a Republican government, and personal liberty and personal security will be insured. There must be Republican government or despotism; there is no middle course; either the law must be supreme, or the ruler supreme; the one is a republic, the other a despotism.*

This subject is the great, the all-important subject before you—compared with it all other matters sink into insignificance.

SECURE US PERSONAL LIBERTY AND PERSONAL SECURITY.

ANTI-DESPOTISM.

The educated, reflective and appreciative will see the force of this pamphlet at a glance—for others, detail, repetition, italics and capitals, &c., are helps.

I suggest the following amendments to the Constitution:

1st. Abolition of pardoning power.

2d. Abolition of fines.

3d. Extension of the writ of habeas corpus, as suggested.

4th. Immediate revision of the criminal code, so that there should be reasonable and not arbitrary enactments, and reasonable and not arbitrary division of crimes, and reasonable terms of imprisonment, and that the law should fix the term of imprisonment, and give no discretion to judges, nor allow suspension of judgment.

5th. An amendment that will give positive and definite expression to the law of the State on the subject of arrest, imprisonment and search.

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